MALAYSIAN REPORTS

UNITED MALAYAN BANKING CORPORATION BERHAD v. PALM & VEGETABLE OILS (M) SDN. BHD. & ORS.

[F.C. (Raja Azlan Shah Ag. L.P., Salleh Abas and Abdul Hamid F.JJ.) September 20 & 21; October 13, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 12 of 1982]

Practice & Procedure – Summary judgment application – Loan facilities given by appellant bank – Guarantee agreements and letters of indemnity – Claim for amount outstanding – Failure to disclose fact that shares had been lodged as security – Shares sold after the commencement of proceedings – No amendment of writ – Allegation of restructuring of loan – Scheme of arrangement and agreement of forbearance of sue – Triable issues raised – R.S.C. 1980, Order 14.

In this case the appellant claimed the sum of $8,540,846.34 being the amount outstanding on the loan granted to the first respondent and for which the other respondents gave letters of guarantee and indemnity. In its Statement of Claim the appellant did not disclose that the first respondent had lodged shares as security for the credit facilities. The shares were sold by the appellant after the commencement of the proceedings and it applied for summary judgment for the sum of $3,490,113.26, after giving credit for the sum realised on the sale of the shares. The Senior Assistant Registrar entered summary judgment for the appellant but on appeal, the learned Judge set aside the Registrar's order and gave the respondents unconditional leave to defend. The appellant appealed. Counsel for the respondents referred to three main issues (1) whether there had been any genuine sale of the shares deposited to third parties at arm's length with full credit given to the respondents of the proceeds; (2) whether the restructuring in 1978 included an agreement to determine the liability of the 1st respondent under the bills finance by transfering that to the 4th respondent and (3) whether in April 1979 there was an informal scheme of arrangement including a temporary moratorium.

Held: there were in fact triable issues in this case and the learned judge was therefore right in giving unconditional leave to defend.

Cases referred to:

(1) *Gold Ores Reduction Co.* v. *Parr* [1892] 2 Q.B. 14.
(2) *Cuckmere Brick Co. Ltd. & Anor.* v. *Mutual Finance Ltd.* [1971] Ch. 949.
(3) *Duke* v. *Robson* [1973] 1 All E.R. 481, 488.
(4) *Standard Chartered Bank* v. *Walker & Anori The Times*, dated June 21, 1982.
(5) *Dobbs* v. *National Bank of Australasia Ltd.* (1935) 53 C.L.R. 643, 651.

FEDERAL COURT.

Robert Gatehouse Q.C. (*Dr. Stephen Goh* with him) for the appellant.

Peter Millett Q.C. (*S. Narayanan* with him) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah Ag. L.P. (delivering the Judgment of the Court): The brief facts of this matter are that in consideration of Guarantee Agreements dated June 1, 1976 for the sum of $5 million in respect of a fixed loan to the 1st respondent for that amount and Letters of Guarantee and Indemnity dated September 1, 1976 for credit facilities for the purchase of bills of exchange by the 1st respondent for the sum of $9 million executed by the 2nd, 3rd and 4th respondents, the appellant granted to the 1st respondent banking facilities to that end, and on the respondent's failure to comply with notices of demand for the outstanding sums due the appellant took out a specially indorsed writ in these proceedings on November 12, 1979 claiming against the respondents the sum of $8,540,846.34 being the aggregate of the amounts then due and outstanding and the accrued interest thereon.

The appellant however in its Statement of Claim did not state that the respondents had in fact as security for the credit facilities to be given to the 1st respondent lodged with the appellant shares (which according to the respondents had as at February, 1981 a total market value exceeding $11 million excluding bonus issue shares) under 4 memoranda of deposit of shares and powers of attorney in its favour. Nor was there any reference therein to some subsequent arrangement between the parties that culminated in a Consolidation Agreement dated October 25, 1978 and the lodging of private caveats by the appellant against certain lands belonging to the respondents. The respondents filed their defence together with a counterclaim by the 1st respondent on December 20, 1979 and on January 12, 1980 the appellant delivered a reply and defence thereto. On February 6, 1980 the appellant took out a summons to strike out the defence and counterclaim but on February 20, 1980 the respondents applied also by summons for leave to file a fresh defence and for the 1st respondent to amend its counterclaim. The record also discloses an amended defence and counterclaim dated March 31, 1980 and another undated defence and counterclaim. There is however an order made on June 5, 1981 giving leave to the respondent to file a fresh defence within 7 days and, pursuant thereto no doubt, a

defence was filed on behalf of the respondents on June 10, 1981. For good measure to close this episode on pleadings we should perhaps mention that when unconditional leave was granted on January 9, 1982 to the respondent to defend this action, they were also granted leave to file an amended Defence and Counterclaim within 30 days, and this was done on February 20, 1982.

The appellant took out on June 16, 1981 an Order 14 Summons for summary judgment against all the respondents for the sum of $3,490,113.26 together with interest at 8% per annum from judgment until realisation and of course for costs. The lesser amount asked for as against the sum of $8,540,846.34 claimed in the statement of claim is explained by the fact that between January and September 1980, after the issue of the writ in this action and without reference to or the knowledge of the respondents, the appellant had disposed of the shares lodged with it as security for the loan, overdraft and purchase of bills of exchange although the fact of such deposit of shares had not been disclosed or adverted to by the appellant in its claim, and according to the supporting affidavit affirmed by the appellant's solicitor a sum of $5,657,763.79 realised from such sale had been credited to the account of the 1st respondent; the amount for which Summary Judgment is sought is accordingly the amount due and owing as at the date of issue of the Order 14 summons.

The appellant's application for summary judgment was heard by the Senior Assistant Registrar who entered judgment for the appellant in terms thereof on August 20, 1981, but on appeal therefrom the learned judge set aside the Registrar's order on January 9, 1982 and gave the respondents unconditional leave to defend.

The short point that arises for determination in this appeal before us from the order of the learned judge is whether there are in the circumstances triable issues which justify leave to the respondents to defend this action. The respondents have raised a number of issues in their defence and Mr. Millet on their behalf refers primarily to 3 main issues, namely, (1) whether there has been any genuine sale of the shares deposited to third parties at arm's length with full credit given to the respondents of the proceeds; (2) whether the restructuring in 1978 included an agreement to determine the liability of the 1st respondent under the bills finance by transfering that to the 4th respondent; and (3) whether in April, 1979 there was an informal scheme of arrangement including a temporary moratorium.

As we have said earlier the deposit of the shares as security was not disclosed in the Statement of Claim when the action was instituted nor was the fact that the security had been realised in a series of sales of the shares between January and September, 1980, and these matters were only disclosed for the first time in June, 1981 in the affidavit in support of the Order 14 Summons. This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the Statement of Claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co.* v. *Parr*[1] where Mathew J., said that "it is most important that a defendant should know from the writ what the exact claim against him is". The respondents also complain of the timing of the sale and the price realised and we would on this aspect refer to *Cuckmere Brick Co. Ltd. & Anor.* v. *Mutual Finance Ltd.*[2] [which was applied in *Duke* v. *Robson*[3]] that the duty of a mortgagee to a mortgagor when exercising his power of sale is to take reasonable care to obtain a proper price, a duty which has since been extended by the English Court of Appeal to guarantors as well in *Standard Chartered Bank* v. *Walker & Anor.*[4] We would add that even after the sale of the shares there was and has been no attempt to amend the Statement of Claim to reflect the true position.

The respondents raised several defences in respect of the sale of the shares deposited and for reasons of brevity it will suffice to refer to paragraphs 3 to 6 of the amended defence and counterclaim dated February 20, 1982 which in effect reflect and repeat the averments in the affidavits affirmed by the 3rd respondent which include pleas of waiver on the part of the appellant by electing to sue on the debt without realising the security and estoppel in that they continued to their detriment to trade in the belief that the shares had not been sold. The first sale of shares took place on January 24, 1980 but the appellant applied on February 6, 1980 to strike out the defence and enter judgment on its claim in full as set out in the Statement of Claim without any credit being given for the proceeds of the sale of the shares. The proceeds of the series of sales were not credited in the statement of accounts as at December 31, 1980 although all the shares had been disposed of in September, 1980. The appellant's manager affirms in an affidavit to the

effect that the proceeds of the sales were credited into a suspense account for the benefit of the respondents and states that it is the standard practice of banks to do so and not credit such moneys into the respondents' account until settlement by consent or by an order of court. And yet in the face of this averment, in the application for summary judgment and before any order made the appellant purported in fact to credit the respondents with the proceeds of the sale of the shares to seek summary judgment for a lesser sum. Correspondence from the respondents' solicitors in the latter part of 1980 with regard to the fate of the shares deposited elicited no response and a letter of February 18, 1981 from the appellant's solicitors again gives no information whatsoever on the query posed and makes no more than a terse and elusory observation that the appellant has exercised and would continue to exercise its rights under the security documents until full discharge of the moneys owing.

The appellant seeks to rely on the conclusive evidence clause in the memoranda of deposit of shares in relation to a certificate by an officer of the appellant but that clause only results in precluding a challenge to the certificate in so far as the existence and the amount of the debt is concerned, and, in *Dobbs* v. *The National Bank of Australasia Ltd.*(5) the High Court of Australia said (at page 651) that such a clause should not be interpreted as covering all grounds which go to validity of a debt. The respondents have put in a counterclaim as well for damages for the loss allegedly sustained as a result of the sale of the shares deposited in the circumstances. The several points taken in relation to the non-disclosure of the security given and its midstream sale after the institution of proceedings and again without disclosure to the respondents would in our view require proper investigation and cross-examination and accordingly justify a trial in respect thereof.

On the issue taken with regard to the restructuring in 1978, the question raised is whether that part of the restructuring relating to the proposal by the appellant to grant a further term loan of some $7 million odd to the 4th respondent for the purpose of repaying the 1st respondent's liability on the bills account was implemented. The contention of the respondents on this point would appear to be that it was and that as a result the appellant is still owed moneys on the term loan but not on the bill facilities but the amount due under the term loan is less than the proceeds from the sale of the shares deposited. This aspect again entails evidence being adduced and tested in cross-examination and merits trial.

On the matter of the informal scheme of arrangement in April, 1979, particulars of which are set out in the amended defence and the affidavits of the 3rd respondent, the respondents contend that there was forbearance to sue on the part of the appellant and that the notice of demand was therefore premature and bad and there was accordingly no cause of action at the date of issue of the writ in these proceedings. The appellant denies this and says there was in any event no consideration for any such agreement, and in this regard the respondents allege they did give further security and say that they are only alleging that the action is premature. The appellant did however in fact lodge caveats on properties belonging to the respondents and the grounds for lodging the caveats do in fact indicate clearly that one of the considerations therefor was the the appellant withholding legal action to recover outstanding moneys. The Assistant General Manager of the appellant also in an affidavit affirmed on April 23, 1979 refers to the appellant's forbearance to sue but states that the 3rd respondent did not ensure the completion of the second charge which was part of the arrangement. The 3rd respondent however in an affidavit affirmed on February 12, 1981 denies this allegation and explains that the first chargee had refused to give its consent thus precluding the registration of the second charge which had been executed. All these allegations raise questions which necessitate a trial for the issue in dispute to be determined and resolved.

We have not dealt in any detail with the facts and particulars of the several allegations made on both sides as it is not our province to touch on the merits of the issues involved. We only need to consider whether or not there are issues or questions in dispute which ought to be tried. Summary judgment is only given in a plain and obvious case. This is certainly not one. We find as we have indicated that there are in fact triable issues and this is substantiated by the necessity for applications for the admission of Queen's Counsel in this appeal on the grounds of the complexity of the case which involves difficult questions of fact and law and also the voluminous affidavits and exhibits put in and the arguments presented before us over a period of two days.

We accordingly dismiss this appeal with costs and order the deposit lodged in court to be paid out to the respondents to account of their costs.

Appeal dismissed.

Solicitors: *Stephen Goh & Partners; Ng Ek Teong & Partners.*

ENG AH MOOI & ORS. v. OVERSEA CHINESE BANKING CORPORATION LTD.

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid F.JJ.) August 18; December 3, 1982]

[Ipoh – Federal Court Civil Appeal No. 95 of 1980]

Land Law – Charges on land to secure overdraft facility – Land charged sold to third parties – Third parties applying to discharge the charge – Whether chargee can refuse to discharge charge – Claim of general lien for other sums due.

Banking – Charges – Two current accounts – Charges on land to secure overdraft on first account – Overdraft pledge account pledging all stock in trade to secure overdraft facilities of not more than eighty per cent of value of stock – Sale of the land charged to third parties – Third parties applying to discharge charge – Whether bank as chargee can refuse to discharge charge – Claim of general lien for other sums due.

In this case one Koh Yik Khoay (the chargor) ran a rice mill business and maintained two accounts with the respondent bank. To secure overdraft facilities on the first account he executed two charges in respect of land belonging to him in favour of the respondent. The amount due on this account was $52,219.71. The second account was an overdraft pledge account in respect of which Koh signed an undertaking pledging all his stock in trade, that is, rice and padi stored in his godown to the respondent in return for overdraft facilities not more than 80% of the value of the stock at any one time. This overdrawn account amounted to $199,824.45. The respondent sent letters (a) demanding payment of the money overdrawn on the first and second accounts; (2) giving notice to Koh of the respondent's intention to exercise its power of sale under the pledge and (3) sending a notice of default under section 254 of the National Land Code with a view to applying for a judicial sale of the two pieces of charged land. To save himself from social embarrassment, Koh agreed to sell the lands to the appellants for $52,000.00, the purchase money to be applied to secure the discharge of the charges. The appellants applied to discharge the charges but the respondent refused to accede to their request. The appellants thereupon sued the respondent for a declaration that they are entitled to the discharge of the charges on payment of the amount due. The respondent maintained in his defence that the sale agreement was a fraud and that it had a general lien to retain the charges for the sum due not only on the first account but also on the second account.

In the High Court the learned trial judge agreed with the respondent's defence and dismissed the suit. The appellants appealed.

Held: (1) just as a mortgage is not irredeemable, likewise a charge is not undischargeable;

(2) in this there was no fraud in the sale agreement. The fact that the appellants agreed to mount a rescue operation to save Koh from public shame by buying the property at considerably below the market price could not be held against them, if the respondent's debt was fully protected;

(3) in the present case the arrangements were so specific and precise that there is no room left to doubt as to the parties' intention. The parties did not intend a general lien to arise in respect of the securities for the overdraft due on the second account;

(4) as there was no fraud as respects the sale agreement by which the appellants bought the charged land from Koh and as the respondent had no general lien to hold the charges for the sum due on the second account, the appellants must succeed in the appeal and are entitled to the prayers asked for.

Case referred to:

(1) *Pearce* v. *Morris* (1869-70) 5 L.R. Ch. App. 227, 230 & 231.
(2) *Brandao* v. *Barnett* (1846) 12 Cl. & Fin. 787, 805; 8 E.R. 1622.
(3) *Jones* v. *Peppercorne* (1858) Johns. 430; 70 E.R. 490.
(4) *In re London & Globe Finance Corporation* [1902] 2 Ch. 416.
(5) *Wylde* v. *Radford* (1863) 33 L.J. Ch. 51.
(6) *In re Bowes* (1886) 33 Ch. D. 586.
(7) *Cuthbert* v. *Robarts, Lubbock & Co.* [1909] 2 Ch. D. 226.

FEDERAL COURT.

Karpal Singh for the appellants.
Philip Leong for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the Judgment of the Court): One Koh Yik Khoay (the chargor) ran a rice mill business under the name of Chip Hong Rice Mill. He maintained two current accounts with the respondent bank. The first account, being A/c No. 1676, was opened on December 13, 1957. To secure an overdraft facility on this account up to the limit of $50,000.00 Koh executed two charges in respect of two pieces of land belonging to him in favour of the respondent. On the material date, the amount due on this account was $52,219.71.

The second account being A/c No. 1697 was opened on February 5, 1958. This account was an overdraft pledge account in respect of which